Supreme Court, U. S.
FILED
OCT 5 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1978

No. 78-570

PREMIER CORPORATION,

Petitioner,

v.

SHEVIN, SHAPO & SHEVIN, P.A.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

James R. Beuche
Bruce T. Wallace
HOOPER, HATHAWAY, FICHERA & PRICE
Tenth Floor, First National Building
Ann Arbor, Michigan 48104

Attorneys for Petitioner Premier Corporation

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

INDEX

Page

OPIN ONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 3

RULES AND STATUTES INVOLVED 4

STATEMENT 4

REASONS FOR GRANTING THE WRIT 10

CONCLUSION 21

APPENDIX

FIRST ORDER OF THE DISTRICT COURT 1a

FIRST ORDER OF THE COURT OF APPEALS 4a

SECOND ORDER OF THE DISTRICT COURT 6a

FINAL ORDER OF THE COURT OF APPEALS 12a

FED. R. CIV. P. 23. . . . . 15a

ERA SETTLEMENT AGREEMENT 18a

PREMIER SETTLEMENT AGREEMENTS 21a

TABLE OF AUTHORITIES

CASES: **Page**

Daniel v. Penrod Drilling Company.
393 F. Supp. 1056 (E.D. La. 1975). 16

In re Four Seasons Securities Law Litigation.
59 F.R.D. 657 (W.D. Okla. 1973) 14

Greenfield v. Villager Industries, Inc..
483 F.2d 824 (3rd Cir. 1973) 15

Held v. Missouri Pacific Railroad Co..
64 F.R.D. 346 (S.D. Tex. 1974) 14

Johnson v. Georgia Highway Express, Inc..
488 F. 2d 714 (5th Cir. 1974) 9, 10

Kiser v. Miller.
364 F. Supp. 1311 (D.D.C. 1973). 20

Lum v. Stinnett.
488 P.2d 347 (Nev. 1971). 16

Magana v. Platzer Shipyard, Inc..
74 F.R.D. 61 (S.D. Tex. 1977) 20

Magida v. Continental Can Co., Inc..
231 F.2d 843 (2nd Cir. 1956),
cert. denied 76 S.Ct. 1031 (1956) 20

Maynard, Merel & Co., Inc., v. Carcioppolo.
51 F.R.D. 273 (S.D.N.Y. 1970) 14

Moreland v. Rucker Pharmacal Co., Inc..
63 F.R.D. 611 (W.D. La. 1974) 15

Muntz v. Ohio Screw Products.
61 F.R.D. 396 (N.D. Oh. 1973) 15

Perlman v. Feldmann.
160 F. Supp. 310 (D.C. Conn. 1958). 14

Philadelphia Electric Co. v. Anaconda American Brass Co., 41 F.R.D. 518
(E.D. Pa. 1967). 15

Pittston Co. v. Reeves.
263 F.2d 328 (7th Cir. 1959) 15

Rothman v. Gould.
52 F.R.D. 494 (S.D.N.Y. 1971) 15

Sprague v. Ticonic National Bank.
59 S. Ct. 777 (1939). 20

State of Illinois v. Harper & Row Publishers, Inc..
55 F.R.D. 221 (N.D. Ill. 1972) 20

Ward v. Ochoa.
284 So. 2d 385 (Fla. 1973) 16

Yaffe v. Detroit Steel Corp..
50 F.R.D. 481 (N.D. Ill. 1970) 15

STATUTES AND RULES:

12 C.F.R. §220 (1973) 5

15 U.S.C. §78(g) 4

18 U.S.C. §1503. 17

28 U.S.C. §1254(1). 2

Fed. R. Civ. P. 23. . . . . 4, 15

MISCELLANEOUS:

Class Actions, 89 Harv. L. Rev. 1318 (1976) 20

IN THE

Supreme Court of the United States

October Term 1978

No.

PREMIER CORPORATION,

Petitioner,

v.

SHEVIN, SHAPO & SHEVIN, P.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Premier Corporation ("Premier") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on August 17, 1978.

OPINIONS BELOW

The first order of the District Court, Southern District of Florida (App. 1a) is unreported.

The first order of the United States Court of Appeals for the Fifth Circuit (App.4a) (remanding the case) is reported at 565 F.2d 1353 (5th Cir. 1977).

The second order of the District Court (App. 6a) is unreported.

The final order of the Court of Appeals (App. 12a) is reported at 578 F.2d 566 (5th Cir. 1978).

JURISDICTION

The final order of the Court of Appeals was entered on August 17, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

In defending against Petitioner's suit on a promissory note, respondent counsel threatened to initiate a class action counterclaim unless Petitioner agreed to settle the suit on terms demanded by counsel, and then filed that class counterclaim when Petitioner would not settle. The class counterclaim asserted the derivative liability of Petitioner (a securities issuer), for an alleged securities violation by a broker who had sold Petitioner's securities. Class Counsel also asserted a class claim against the broker. After filing the two class claims, Class Counsel effected a secret settlement agreement between the Class Representative and co-defendant broker. That agreement settled the class claim against the broker without notice to the court, to the members of the class, or to Petitioner. The agreement also required that the Class Representative and the broker continue to maintain the appearance of adversity in the litigation and, under that guise of adversity, required the broker to file certain "admissions" which were then used to support a Motion for Summary Judgment against Petitioner. Finally, the agreement required that the

broker's trial testimony be restricted in accordance with the terms of the agreement, at risk of forfeiture of the settlement. With the Motion for Summary Judgment based upon the broker's admissions pending against Petitioner, Petitioner was required to settle with the Class Representative. The settlement terms required for the Class Representatives were substantially more favorable than those negotiated and accepted for the Class. Respondent Class Counsel was then awarded substantial attorney's fees by the District Court. The questions presented are:

1. Respecting the following tactics by class counsel in class litigation under Rule 23:

(a) Is it permissible for class counsel to threaten and initiate class litigation in order to extract a monetary settlement for the class representative alone?

(b) Is it permissible for class counsel to effect a secret settlement of a class claim against one class defendant without notice to the court, the class, or the other class defendant?

(c) Is it permissible for class counsel to effect a secret settlement with one class defendant which requires the maintenance of false adversity and requires the settling defendant's "admissions", in order to support a Motion for Summary Judgment against the non-settling defendant?

(d) Is it permissible for class counsel to effect a secret settlement with one defendant which requires the settling defendant's testimony at trial to be restricted?

(e) Is is permissible for class counsel, after effecting such a secret settlement, to extract from the remaining defendant a settlement with the class representative which is substantially more

favorable than the settlement negotiated and accepted for the class?

2. Should tactics which are abusive to the class action device and the federal judicial process be considered and addressed in the attorney's fee determination proceedings.

RULES AND STATUTES INVOLVED

The rule involved is Fed. R. Civ. P. 23 (App. 15a). The decision of the Court of Appeals with respect to attorney's fees was purportedly based on the equitable power of the courts, and accordingly, no statute is directly relevant.

STATEMENT

This Petition seeks review of the Judgment of the United States Court of Appeals for the Fifth Circuit, affirming an award to the law firm of Shevin, Shapo & Shevin, P.A. ("Class Counsel") of attorney's fees of $125,000. The fee was awarded to Class Counsel in connection with a class counterclaim filed on June 3, 1975, on behalf of purchasers (the "Class") under a registered offering (the "Offering") of breeding cattle sold by Premier Corporation ("Premier"). The class action was filed as a counterclaim to Premier's suit against Julio R. Serrano ("Serrano") individually for non-payment of a promissory note. On September 4, 1975, that class counterclaim was settled, with Premier agreeing to pay attorney's fees for the class claim, as determined by the District Court.

Premier filed suit on February 25, 1975, against Serrano to collect sums due under agreements made in connection with the Offering. The jurisdiction of the District Court was originally invoked because of diversity of citizenship. Premier having its principal place of business in Michigan and Serrano being a citizen of Florida. Jurisdiction as to the class claims was based upon the Securities Exchange Act of 1934, 15 U.S.C. §78.

On May 16, 1975, Class Counsel advised Premier that, unless Premier settled the invidivual claim against Serrano upon terms favorable to Serrano, a class counterclaim would be filed on behalf of Serrano and all purchasers under the offering (Page 343).[1] That demand was rejected. On May 30, 1975, by delivery to Premier, in advance of filing, of a proposed amended pleading alleging class action counts, Class Counsel again sought to extract an individual settlement for Serrano (Page 345). As Premier continued to resist the settlement demand, Class Counsel, on June 3, 1975, filed that amended pleading (Page 14), introducing two counterclaims in the name of the Class, Count X against Premier and Count XI against Economic Research Analysts, Inc. ("ERA"), a selling broker in the Offering. Each class count was based upon a single claim, the alleged violation in the Offering of Regulation "T" of the Federal Reserve Board, 12 C.F.R. §220 (1973), which regulates certain practices of brokers in the sale of securities. The class counterclaim against Premier alleged that Premier was derivatively liable for ERA's conduct. Each class counterclaim (Pages 38-44) sought rescission pursuant to 15 U.S.C. §78(g).

On June 10, 1975, Serrano moved for certification of the class counterclaim against Premier. The District Court certified the Class against Premier on July 10, 1975 (Page 144).

No motion was filed at that time, or later, for certification of the class counterclaim against ERA. Instead, on July 18, 1975, Serrano, through Class Counsel, signed an agreement with ERA (the "Agreement"), not disclosed to the District

---

[1] Unless otherwise indicated, record citations are to page numbers in the Court of Appeals Appendix which has been certified and forwarded to the Clerk of this Court. Many citations are supported by additional documents and transcripts in the original court record not yet transmitted. The limited Appendix to this Petition will be cited as (App. 1a-27a).

Court, the Class or the other litigants (App. 18a-20a). The Agreement provided, *inter alia*, that ERA:

(1) pay $100 to Serrano;

(2) file an answer to the individual and class counterclaims of Serrano raising no affirmative defenses;

(3) immediately serve responses to Serrano's requests for admissions;

(4) cause Richard McIntyre (ERA's President) not to "testify in a manner materially inconsistent with the testimony he gave at his deposition"; and

(5) not move for "acquittal" prior to trial or prior to the time Serrano rested his case at trial.

In exchange, Serrano agreed to:

(6) voluntarily dismiss the individual counterclaim (Count IX) against ERA;

(7) not move to certify the class counterclaim (Count XI) against ERA or pursue that claim in anyway;

(8) not seek judgment against ERA in connection with the suit and, if judgment was nonetheless entered, not execute and/or levy on that judgment, but instead file a satisfaction of judgment;

(9) immediately serve responses to ERA's requests for admissions; and

(10) not oppose ERA's motion for directed verdict at trial.

The Agreement was not at that time, and has never been, disclosed to the Class members. The Agreement was not disclosed to Premier and the trial court until December of

1975, then in response to the court order of December 19, 1975 (Page 297).

The alliance of Serrano and ERA was first suggested by the docketing, pursuant to the Agreement (App. 18a-20a), of their reciprocal Requests for Admissions and Admissions (Pages 148-153), and by Serrano's filing of a motion for summary judgment on the derivative liability claim against Premier (Pages 162-179), supported by the Admissions of ERA. Premier, upon receipt of those pleadings in July, 1975, petitioned to the District Court, expressing the suspicion of a secret agreement.

Class Counsel reponded by assuring the Court that "claim of 'conspiracy' is ridiculous". The District Court never acted on that petition by Premier.

Confronted with (a) the certification of a class counterclaim against Premier alone, (b) the failure of the District Court to respond to Premier's petition regarding the apparent Serrano-ERA alliance, and (c) the prospect of future "admissions" by a co-defendant now misalligned in the litigation and for whose conduct Premier was alleged to be derivatively liable, Premier settled the litigation.

On August 13, 1975, Class Counsel, on behalf of Serrano, signed a letter-agreement with Premier agreeing to settlement of the case. That agreement (App. 21a-25a) provided that all individual claims and defenses by and against Serrano would be released and that Premier would pay $35,000 to Serrano. No provision was made in the letter-agreement for recovery to the Class. On the contrary, the letter-agreement expressly anticipated Premier's re-argument to the District Court of its position that the class certification was incorrect. The letter-agreement was accordingly "contingent upon determination and order by the court that the orders certifying the alleged class action be vacated entirely". The effect of the anticipated vacation

order, in light of the prior ERA Agreement, would have been to remove the Class entirely from the litigation and thus to preclude any recovery to the Class.

Premier, on August 14, 1975, filed its motion for reconsideration of the certification orders. At Class Counsel's request (App. 24a-25a). Premier filed a one paragraph Reply Memorandum prepared by Class Counsel to that motion (Page 207). Nonetheless, the trial court denied Premier's motion to vacate on August 18, 1975.

The trial court's refusal to vacate the certification order resulted in a revised settlement (App. 26a-27a) providing recovery to the Class, as well as to Serrano. The terms of settlement required by Class Counsel for Serrano, however, contrasted with those accepted for the Class. The settlement to the Class was the extension of certain "early termination rights" in the cattle management contract between Premier and each Class member, providing a continued "floor to investment risk". Neither party disputes that this settlement to the Class was beneficial under the circumstances. Nonetheless, that benefit was intangible in nature, and its monetary value entirely speculative upon future market variables.

The Class settlement was not accepted for Serrano. Instead, Premier was required to make an immediate cash payment to Serrano of $37,500, an amount $14,000 in excess of that payable had Serrano successfully sued for rescission.[2]

Premier was required as well in the settlement to assume the obligation of the Class for attorney's fees to Class Counsel for representation of the Class (Page 285). That fee was to be fixed by the District Court upon evidence presented (Page 285).

[2] Serrano had invested approximately $23,000 under the Offering.

The proposed Class settlement was presented to and preliminarily approved by the District Court on September 4, 1975. The settlement was finally approved by the District Court at a hearing held on October 16, 1975 (Page 292).

A hearing to determine Class Counsel's fee entitlement was scheduled for December 23, 1975. Prior to that hearing, Class Counsel submitted a sworn petition to the District Court seeking to justify a fee of $445,000. Because the fee claimed was for a class suit of approximately three months duration, Class Counsel's Petition focused extensively upon a percentage fee claim based upon a speculated dollar appraisal of the extended contract right. Premier objected to that claim by raising, *inter alia*, the questions raised in this Petition.

The District Court, at the fee hearing, acknowledged the petitions and briefs submitted by the parties and heard testimony regarding Class Counsel's sworn petition for $445,000 and Premier's objections to that claim. On March 4, 1976, the District Court entered its Order on the Application for Attorney's Fees (App. 1a), awarding to Class Counsel a fee of $125,000. In that opinion, the District Court failed to provide any discernible basis for the fee awarded. It also failed in any way to address the issues raised in this Petition.

Premier appealed the District Court's order to the Court of Appeals for the Fifth Circuit, raising the issues set forth in this Petition, together with the additional issue of whether that Court's guidelines in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), had been complied with by the District Court. Based apparently only upon non-compliance with the *Johnson* standards, the Court of Appeals vacated the judgment and remanded the case to the District Court for further findings respecting the fee award.

In the remand proceedings, Premier again raised the issues cited in this Petition, submitting in support thereof twenty pages of proposed findings of fact and conclusions of law. As in its initial fee determination, the District Court disregarded the issues now raised in this Petition and affirmed its earlier award.

The Court of Appeals, by its final order in this cause, found that the District Court had satisfactorily complied with *Johnson* in the remand proceedings, and affirmed the $125,000 fee award as not constituting an abuse of discretion. That order again did not address the issues raised in this Petition.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS, IN FAILING TO ADDRESS AND REPUDIATE TACTICS OF COUNSEL WHICH ARE DEMONSTRABLY ABUSIVE TO THE CLASS ACTION DEVICE AND THE FEDERAL JUDICIAL PROCESS, WILL RESULT IN THE PROLIFERATION OF THE USE OF SUCH TACTICS IN, AND THE SUBVERSION OF THE INTENDED AND PROPER PURPOSE OF, CLASS ACTION LITIGATION.

Petitioner seeks review of the propriety of certain tactics of counsel in class litigation, and the necessary bearing of those tactics upon judicially determined attorney's fees.

The decisions of the lower courts in this case, though rejecting Class Counsel's sworn petition for $445,000 by the final award of $125,000, left completely unanswered critical questions as to what tactics can, and cannot, be used by counsel in class litigation and as to the intended and proper use of the class action device. Despite three years of requests by Premier, neither the District Court, nor the Court of Appeals, has addressed in any way (a) the threatened and actual use of class litigation as leverage to

procure an extraordinary individual settlement for the class representative or (b) the propriety of the ERA Agreement which settled a class action against ERA without notice to the Class of the Court, which undertook to restrict testimony in federal proceedings and which, without notice to Premier or the Court, secured the "admissions" of ERA, against whom recovery had been secretly waived, in order for those "admissions" to be used as the basis for claims against Premier.

The importance of these questions, in the final analysis, relates simply to the intended and proper function of class litigation in the federal judicial process. It is conventional wisdom that litigation pursuant to Rule 23 is a powerful device, as it must be to protect the interests of members of a class. This is so even when the competing litigants comply in every respect with the strictures of the Rule and with the special duties imposed upon those litigating under it. But while many class action defendants, and their counsel, have argued that the Rule is inherently imbalanced in favor of class plaintiffs, that is emphatically not the subject matter of this Petition. Equally emphatically, however, it is submitted that unless litigation under Rule 23 is conducted with a high degree of propriety, and unless the areas of potential abuse under the Rule are controlled by explicit administration by the courts, tactics of the kind employed in this litigation may so proliferate as ultimately to subvert the purposes of the Rule and destroy the Rule itself. For if the class action is an inherently powerful device, it is rendered a destructively overpowering weapon if abused by the tactics here challenged. And if class actions provide powerful leverage, that leverage is abused *a fortiori* when it is employed to extract for the class representative a settlement that is exorbitant in comparison to his maximum potential recovery and in comparison to the settlement demanded for the members of the class he represents.

Premier has, for three years, urged to judicial authorities that Rule 23 has been critically abused, and has submitted the agreements appearing in the Appendix hereto, as well as extensive pleadings and testimony, to demonstrate that fact. Yet no court has uttered a word of agreement, disagreement, or explanation for silence as to these issues. There would seem to be but four responses, other than silence, to the subject matter of this Petition:

(1) That the facts presented are untrue — a response that would contradict the record and leave unexplained the question why Class Counsel has never rebutted[1] and two lower courts have never even suggested the inaccuracy of the facts presented;

(2) That the facts presented are true, but do not constitute impermissible tactics — a response that is rebutted by those relatively few authorities that have expressly addressed these issues;

(3) That the facts presented are true, and the tactics impermissible, but that those tactics have no bearing on Class Counsel's fee entitlement, presumably because Premier had agreed to pay attorney's fees — a response which necessarily ignores the fact that Premier did not learn the contents of the ERA Agreement until after

[1] Class Counsel admits, for example, execution of the ERA Agreement, and settlement letters with Premier, appearing in the Appendix. Class Counsel has, however, with varying explanations in the Courts below, vigorously urged that there is nothing improper about entering into such agreement.

agreeing to pay Class Counsel a reasonable fee, and ignores the reality that, if such issues cannot be raised in connection with post-settlement fee determination, there may be no redress for litigants who have been compelled by such tactics to accept early settlement of abusive class litigation; or

(4) That the facts presented are true, that the tactics they evidence are impermissible, and that those tactics bear adversely upon Class Counsel's fee entitlement.

Nonetheless, the response of the courts below was silence, providing no guidance as to the permissibility of the tactics here challenged in this and future class litigation.

Premier urges that a fair recounting of the circumstances of this case, juxtaposed to a final award of any substantial fee, would produce an opinion and order wholly at odds with the principles underlying the Federal Rules generally and Rule 23 in particular. A statement of the circumstances of this case, however, in the context of reversing the instant fee award, would serve as an unmistakable directive to all concerned as to the level of conduct required of counsel in class litigation.

The federal courts and federal bar require this Court's statement as to the standard of conduct of counsel who undertake and are judicially appointed to represent entire classes of individuals. The instant case, unfortunately characterized by an extraordinary pattern of abuses, would serve as the basis for this Court to consolidate in one statement, broad guidance for the future of Rule 23 litigation.

(a) The threatened and actual use by counsel of a class counterclaim as the means to extract an extraordinary individual settlement for the class representative is abusive of the class action device.

The greatest potential abuse of Rule 23 is that, by means of its inherent power, the class action may be used as a means to extract unwarranted settlements for the individual litigant, to the detriment of the class members, the courts and the class defendant. *Held* v. *Missouri Pacific Railroad Co.*, 64 F.R.D. 346 (S.D. Tex 1974); *In re Four Seasons Securities Law Litigation*, 59 F.R.D. 657 (W.D. Okla. 1973); *Maynard, Merel & Co., Inc. v. Carcioppolo*, 51 F.R.D. 273 (S.D.N.Y. 1970); and *Perlman v. Feldmann*, 160 F. Supp. 310 (D.C. Conn. 1958).

It is submitted, and the record evidences, that the class allegations in this case were conceived and prosecuted for the purpose of extracting a favorable settlement for Serrano, the individual litigant. Twice prior to the filing of the class counterclaim, Class Counsel threatened the use of a class action unless Serrano's demands were met. Petitioner's resistance to settlement resulted in actual initiation of class litigation and continued pressure upon Petitioner to meet the Class Representative's individual demands. Ultimately those demands succeeded in extracting settlement. Initially, the settlement required was a $35,000 payment to the Class Representative, without provision for the Class. When the trial court refused to reconsider the class certification as anticipated by that settlement, a second settlement was made, requiring a $37,500 payment to the Class Representative ($14,000 more than his total investment) with a non-monetary settlement for the Class.

It may be, in the final analysis, that the practice of including class and non-class claims in a single lawsuit is so susceptible to potential abuse as to require limitation or

prohibition by this Court. Short of that action, what is clearly required is a declaration by this Court prohibiting practices which actually employ class litigation for individual benefit.

(b) The use by counsel of a secret agreement with a co-defendant which (1) settles a class claim against that defendant without notice to the class, or the court, or the other defendant, (2) requires the false appearance of adversity in litigation and (3) undertakes to restrict the trial testimony of the released co-defendant, is abusive to the federal judicial process in general, and to the class action device in particular.

(1) Rule 23(e) provides, in pertinent part, that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class. . . ." Fed. R. Civ. P. 23(e).

The few courts to have addressed the issue of impermissible settlement make it clear that a class allegation is treated as a class action unless and until the trial court has determined that the action may not so proceed, see, e.g. *Moreland* v. *Rucker Pharmacal Co., Inc.*, 63 F.R.D. 611 (W.D. La. 1974), and that notice to the Court and to the class of any settlement are required. *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824 (3rd Cir. 1973), *Pittston Co. v. Reeves*, 263 F.2d 328 (7th Cir. 1959), *Muntz v. Ohio Screw Products*, 61 F.R.D. 396 (N.D. Oh. 1973), *Rothman v. Gould*, 52 F.R.D. 494 (S.D.N.Y. 1971), *Yaffe v. Detroit Steel Corp.*, 50 F.R.D. 481 (N.D. Ill. 1970), *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 41 F.R.D. 518 (E.D. Pa. 1967).

The Agreement between the Class Representative and Petitioner's co-defendant, broker ERA, directly violated Rule 23(e).

Where Rule 23(e) is not followed, most frequently in instances where a class action is alleged but settled on behalf of one or more individual plaintiffs before the class is notified, the single greatest potential class action abuse, enhancement of individual bargaining power, is once again effectuated. Until there is a clear statement from this Court regarding the requirements of Rule 23(e), class counsel, perhaps joined by defense counsel necessarily eager to settle with the smallest possible number of litigants, will continue to attempt to persuade lower courts that the requirements of Rule 23(e) are not triggered until a class has been certified.

(2) The use of so-called "Mary Carter" agreements, settling litigation between plaintiff and one of multiple defendants while continuing to maintain the appearance of adversity in the litigation, deceives the court and non-participating litigants. Such agreements are against public policy and the intent of the Federal Rules of Civil Procedure.

"Mary Carter" agreements have been condemned as violative of public policy, prejudicial to the non-agreeing defendant, and inimical to the adversary process by the few courts addressing the issue. Please see, *e.g.*, *Daniel v. Penrod Drilling Company*, 393 F. Supp. 1056 (E.D. La. 1975), *Ward v. Ochoa*, 284 So. 2d 385 (Fla. 1973), *Lum v. Stinnett*, 488 P.2d 347 (Nev. 1971).

In the instant case the Class Representative settled with Petitioner's co-defendant, ERA, and elicited unqualified Rule 36 "admissions" from that co-defendant pursuant to the Agreement. Those admissions, appearing to the court to be admissions of a party adverse to the Class Representative, were then used as the basis for the Class Representative's Motion for Summary Judgment on the

class count against Petitioner Premier. With that motion pending, Premier itself was constrained to settle with the Class Representative.

If the "Mary Carter" device is inconsistent with the purposes of the Federal Rules generally, it is particularly abusive in class actions where the risk of imbalance in favor of class plaintiffs is substantial. Petitioner urges the need for this Court ot take judicial notice of the growing employment of "Mary Carter" agreements and to prohibit their continued use in Federal litigation.

(3) Any contractual undertaking to restrict testimony in federal judicial proceedings is improper.

If not clearly violative of 18 U.S.C. §1503, agreements respecting sworn testimony are, at a minimum, clearly contrary to the policy underlying that statute.

The ERA Agreement provided as to the president of ERA that "if called to testify at trial, [he would] not testify in a manner materially inconsistent" with his earlier deposition testimony (App. 19a). Even standing alone, such a contractual term between the litigants in this case would warrant unequivocal judicial response. In the instant case, however, the provision (1) did not stand alone, and (2) arises in a context where the drafters of the contract seek a judicially established fee award for legal services.

Petitioner does not suggest that such contractual terms are commonplace, so as to require this Court's express prohibition. But in order to ensure that the standard of conduct particularly required of judicially appointed counsel be met in all respects, a statement that indisputably prohibited practices will bear negatively on fee entitlement is required of this Court.

II. THE DECISION OF THE COURT OF APPEALS, BY FAILING TO ADDRESS AND TAKE INTO ACCOUNT THE ABUSIVE PRACTICES OF COUNSEL IN DETERMINING THE FEE ENTITLEMENT, EFFECTIVELY CONDONES THOSE TACTICS AS PROPER IN RULE 23 LITIGATION, WITH THE RESULT THAT THOSE TACTICS WILL BE REPEATED, AND THE PURPOSES OF RULE 23 AGAIN SUBVERTED, IN FUTURE CLASS LITIGATION.

The tactics complained of in this Petition, as discussed above, starkly contrast with the intended and proper use of the class action device. Yet the decision of the court below, in failing to address those tactics, necessarily conveys the message to class litigants and their counsel that the use of such tactics will go uncorrected. The effect of that message, in light of the increased leverage created by such tactics, is that these tactics will become increasingly common practice in federal litigation.

It is submitted that the explanation for the decision of the Court of Appeals was not that it approved of the challenged tactics, but that it apparently determined that Premier's agreement to assume the fee obligation of the Class deprived Premier of standing to raise the issue of those tactics, and it concluded that taking those issues into account in the fee determination would permit Premier to renege on that agreement. Accordingly, consistent with that conclusion, but in an effort to avoid expressly condoning the challenged tactics, those issues were scrupulously avoided in the decision of the court.

Petitioner asserts that the course followed by the court below, not only ignores the practical realities of class litigation settlements, but defaults in the need of the courts to administer effectively Rule 23 proceedings.

As a practical reality, it is only in the context of the fee determination that the abuses here involved can be effectively addressed. As an initial proposition, in most

cases, as here, all facts evidencing the abuses will not be available to the court and the class defendant until the time of the fee proceedings, when class counsel's conduct is first subject to discovery. More importantly, the fee determination proceeding is the first stage in the proceeding at which the conduct of counsel can be addressed without the risk of that issue, clearly extraneous to the substantive rights of the litigants, significantly affecting those rights. Specifically, at the stage of class certification and at any time prior to the settlement of the case, a finding of counsel misconduct would have the effect of disqualifying counsel, and perhaps the class representative, with the potential effect of disenfranchising the class. As a consequence, even upon the unlikely assumption that the evidence of misconduct is available at that time, the credibility of the class defendant's protests will be suspect given its adversity to the class, and the focus of the trial court's attention will be appropriately directed to protecting the interests of the class. This practical difficulty is compounded, rather than eliminated, at the settlement stage of the litigation. By agreeing to settlement, the class defendant has made the determination that, despite the substantive merits of the case, its best interests, and perhaps survival, require that the case be settled. Having been forced to that conclusion, the class defendant, even if aware of the fact of counsel misconduct, is unlikely to raise issues which might defeat that settlement, particularly if those issues have previously been rejected or ignored by the trial court. As a result, counsel misconduct will not, and most often cannot, be asserted until the fee determination proceedings.

Petitioner submits that the estoppel of a class defendant from raising the issue of counsel misconduct in the fee proceedings ignores the basic realities of class litigation. Moreover, that conclusion ignores the essential fact that the settlement and fee undertaking were the direct and coerced product of the abuse. Finally, and most importantly, given

these basic realities, that conclusion virtually eliminates the possiblity that the courts can effectively control counsel practices of the kind here challenged, other than in contexts where the substantive rights of litigants may be adversely affected by such action.

There is ample authority for the general principles underlying the decision to which this Petition is directed. This Honorable Court, in *Sprague* v. *Ticonic National Bank*, 59 S. Ct. 777 (1939), observed that, as the award of attorneys' fees in class litigation is in equity, the fee determination must be exercised with regard to the particular facts of each case, and with a view to dominating reasons of justice. Several courts, with respect to contingent fee agreements in class litigation, have rejected contractual undertakings as to fees and have made awards based upon the particular facts and circumstances of the case. *Magana v. Platzer Shipyard, Inc.*, 74 F.R.D. 61 (S.D. Tex. 1977). *Kiser v. Miller*, 364 F. Supp. 1311 (D.D.C. 1973). *State of Illinois v. Harper & Row Publishers, Inc.*, 55 F.R.D. 221 (N.D. Ill. (1972). And at least one court, while not holding on the issue, recognized the principle that the misconduct of counsel should be considered in the determination of attorneys' fees. *Magida v. Continental Can Company, Inc.*, 231 F.2d 843 (2nd Cir. 1956), *cert. denied* 76 S. Ct. 1031 (1956). See, also, *Class Actions*, 89 Harv. L. Rev. 1318 (1976).

There is not, however, any decision which has held that the misconduct of class counsel can, and must, be considered in the determination of fees in class litigation. Petitioner believes that, based upon the foregoing facts and authorities, such a decision is required.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

James R. Beuche
Bruce T. Wallace
HOOPER, HATHAWAY,
FICHERA & PRICE
Tenth Floor,
First National Building
Ann Arbor, Michigan 48104

Attorneys for Petitioner
Premier Corporation

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. FL 75-90-Civ-CA

PREMIER CORPORATION, a Delaware corp.
Plaintiff

v.

JULIO R. SERRANO,
Defendant,

ORDER ON APPLICATION FOR
ATTORNEYS' FEES AND COSTS

Counsel for the class seeks attorneys fees and costs pursuant to agreement with Premier (plaintiff-counterdefendant) to pay reasonable fees and costs pursuant to a settlement agreement with the class that was approved by the Court. Class counsel urge that approximately 1,000 hours were dedicated to representation of the class and seek $440,000 on the basis of the benefits accruing, the complexity involved and the time required by them. Class counsel will receive $37,000 for representation of the defendant Serrano who opted out of the class.

Premier admits the agreement but contends, in its reply memorandum, that class counsel are entitled to only $11,100 on the basis of the hours involved computed at the rate of $50 per hour. At the hearing on the application, Premier's expert witnesses testified that the time required should not have exceeded 400 to 500 hours.

The three main criteria sought to be used here as guides are (1) the results obtained, (2) the complexity of the issues and (3) the time involved. Class counsel made a passing

reference to other business lost but no proof was offered in support.

In assessing benefit to the class, I am troubled by the effect of a class victory as opposed to settlement. The benefit had this action continued and been concluded in favor of the class, would have been virtually non-existent. The remedy sought was recission. At the hearing on fairness the court was forcefully made aware that Premier would most likely have been financially ruined if each class member demanded recission and that there were serious tax consequences to class members if they so elected. It appears now, that a class victory would have been phyrric. There would have been a choice to rescind or not; to do nothing would maintain the status quo and involve no benefit; to rescind would have meant not only substantial repayments of past income tax deductions, but also the possibility that Premier would be unable to fund the payments.

Of course, the above considerations tend to increase the value of a settlement. However, there is no monetary fund as a result of counsel's efforts. There is a contingent benefit which will materialize *only if and when* class members sell their herds under the extended termination rights provision. In support of their petition for attorneys' fees, class counsel strenuously urge that the option to sell at the early termination price exists immediately and continuously for the entire duration of each class member's management contract. It is true that the real benefit conferred is the protection each member receives against the risk of a continued depression in the cattle price market. However, the discounted present value of benefit of settlement presented to the Court assumed that the entire class would participate and there is no way for the Court to determine whether this will occur.

After careful consideration of the above, I have determined that this is not a case where a percentage of benefits conferred is a proper standard for awarding attorneys'

fees. *See, Liebman v. J. W. Peterson Coal & Oil Co.*, 63 F.R.D. 684 (N.D. Ill., E.D. 1974) for a case presenting the view of the Third Circuit that the services devoted to representing the class, and not the amount recovered, should be the "lodestar" of fee allowances. Particularly in light of the contingent nature of the benefit received herein I find that reasoning appropriate.

I turn next to the time and labor required. The record supports class counsels' claim that a large segment of the work performed was done upon an emergency basis. It follows, and the Court accepts, the contention of class counsel that the time spent in responding to emergency matters precluded acceptance, or work on, other employment.

There is no question that this case involved novel legal issues. For example, it is admitted by Premier that a substantial fee was paid for research and an opinion that the offering would not violate Regulation T, 12 C.F.R. §220. Class counsel claimed that the offering did in fact violate the Regulation and extensive discovery and research were directed to this issue. Attendant to this claim, was the issue as to the effect of a letter written by a staff attorney at the Federal Reserve Board.

Having given appropriate consideration to the lengthy memoranda, the settlement hearing and the hearing held on application for attorneys' fees, the Court hereby awards a fee of One Hundred Twenty-five Thousand Dollars ($125,000.00) to class counsel plus costs to be taxed in accordance with law.

DONE AND ORDERED at Miami, Florida this 4th day of March, 1976.

/s/ Clyde Atkins
United States District Judge

cc. Shevin Shapo & Shevin
Blackwell Walker Gray et al.
Hooper Hathaway et al.

PREMIER CORPORATION,
a Delaware Corporation,
Plaintiff-Appellant Cross Appellee,

v.

Julio R. SERRANO et al., Defendants-
Appellees Cross Appellant.

No. 76-2049.

United States Court of Appeals,
Fifth Circuit.

Dec. 29, 1977.

Appeals from the United States District Court for the Southern District of Florida; C. Clyde Atkins, Judge.

Before COLEMAN, HILL, and RUBIN, Circuit Judges.

BY THE COURT:

This appeal was argued in New Orleans on December 15, 1977.

Upon consideration of the record, briefs, and oral argument it is

ORDERED

The judgment of the District Court in this case is vacated and the cause is remanded to the District Court for the limited purpose of allowing that Court an opportunity to give reasons for allowing the amount awarded as attorneys fees, expressed in compliance with the requirements of *Johnson v. Georgia Highway Express, Inc.*, 5 Cir., 1974, 488 F.2d 714. Such reasons, whether expressed in the form of an opinion or proposed findings, are essential for the Court adequately to evaluate the issues raised on appeal. Without them, the appellate court is obliged at least in part to

respond to the appeal on the basis of "too little," or "too much," or "just about right." To accomplish the purpose of the remand, the District Court may hold further hearings, if any, as it may see fit.

FURTHER ORDERED that when the purpose of said limited remand shall be accomplished, the District Court will enter either an appropriate opinion or the appropriate findings of fact and conclusions of law in accordance with Rule 52 of the Federal Rules of Civil Procedure, along with a judgment as prescribed by Rule 58 of the Federal Rules of Civil Procedure and shall promptly certify the same to this Court.

FURTHER ORDERED that this Court expressly retains jurisdiction over this appeal for the purpose of finally deciding the same upon receipt of the said duly certified findings of fact, conclusions of law, and final judgment.

The mandate will issue forthwith.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. FL 75-90-Civ-CA

PREMIER CORPORATION, etc.
Plaintiff

v.

JULIO R. SERRANO
Defendant

(1) ORDER SETTING FORTH BASIS FOR AWARDING $125,000. AS A REASONABLE ATTORNEY'S FEES IN ACCORDANCE WITH JOHNSON CRITERIA

(2) ORDER DENYING AS MOOT ALL OUTSTANDING DISCOVERY MOTIONS

THIS MATTER is before the Court in compliance with the Fifth Circuit's Order on Remand directing this Court to enter an Order or Findings conforming with the *Johnson* criteria regarding the reasons for this Court's award of reasonable attorney's fees.

On January 20, 1978, this Court entered an Order requesting counsel for all sides to submit proposed Findings & Conclusions, addressing therein the application of *Johnson* to the evidence of record. The Court also asked the parties to state their position as to what additional evidence, if any, is necessary to supplement the record so that the *Johnson* factors could be adequately considered.

Both sides dutifully complied with the Court's January 20, 1978 Order. On January 31, 1978, the plaintiff-appellant Premier Corporation filed its Proposed Findings & Conclusions. The Court carefully examined these

Proposed Findings & Conclusions, both as they related to the *Johnson* criteria and the non-*Johnson* criteria. On February 6, 1978, plaintiff-appellant Premier also filed a "Statement Regarding Additional Evidence" wherein it urged that "[d]eficiencies in the earlier proceedings clearly did not arise out of this Court's unwillingness to receive Class Counsel's further proofs. Deficiencies in this cause are a direct function of deficiencies in proof." Thus, Premier contends therein that the Fifth Circuit's remand did not include a full "trial de novo" regarding attorney's fees and that "as a matter of policy," a full-scale hearing on "new evidence" would "serve only to encourage 'puffing' and selection of presentation of proofs in the first instance. Accordingly, Premier intends to limit its proofs to brief cross-examination of Class Counsel and his witnesses upon rehearing with perhaps limited rebuttal or impreachment evidence if the circumstances so require."

On January 31, 1978, Class Counsel-appellee filed its "Notice of Filing Proposed Findings as to Award of Attorney's Fees." The Court, likewise, carefully studied said Findings. Therein, Class Counsel "suggested" additional evidence might be necessary in support of higher award under *Johnson*.

Thereafter, the Court re-examined the transcript of the hearing on attorney's fees, as well as all depositions bearing on the issue of attorney's fees, in light of the *Johnson* criteria. In affirming its prior $125,000, award for attorney's fees, the Court agrees with plaintiff-appellant Premier that the evidence of record is adequate for purposes of complying with the remanded instructions. Furthermore, upon examining appellee-Class Counsel's proffers of additional evidence in light of its Proposed Findings & Conclusions, the Court is of the opinion that said proffers are merely cumulative of the evidence of record or irrelevant for purposes of complying with the limited

remand, and thus it is not necessary to receive such evidence.

Accordingly, all outstanding discovery motions are DENIED as moot.

The Court will now discuss the reasons for affirming its $125,000. award in terms of the *Johnson* criteria:

(1) *Time spent and labor required.*

The Court finds that between 900 and 1000 hours were spent in this litigation.

(2) *The skill requisite to properly perform the legal services.*

The Court finds that the instant class action law suit required a high degree of skill to properly perform the legal services. There were complex issues of law and fact involved. Resolution of such issues required much skill.

(3) *Preclusion of other employment by the attorney due to acceptance of the case.*

The Court finds, as stated in its April 4, 1976 Order, that: "The record supports Class Counsel's claim that a large segment of the work performed was done upon an emergency basis. It follows, and the Court accepts, the contention of Class Counsel that the time spent in responding to emergency matters precluded acceptance, or work on, other employment."

(4) *The novelty and difficulty of the questions presented.*

The Court finds, as it did in its April 4, 1976 Order, that: "There is no question that this case involved novel legal issues. For example, it is admitted by Premier that a substantial fee was paid for research and an opinion that the offering would not violate Regulation T, 12 C.F.R. §220. Class Counsel claimed that the offering did in fact violate

the Regulation and extensive discovery and research were directed to this issue. Attendant to this claim, was the issue as to the effect of a letter written by a staff attorney at the Federal Reserve Board."

(5) *The attorney fee.*

The Court finds that the attorney fee for this type of litigation would range from $100,000. to $200,000.

(6) *Whether the fee is fixed or contingent?*

Initially, before the class was created, the fee was not contingent. It was to be based on time expended, complexity of the issues and effort and results. This was later amended to a contingency of 50% of the recovery. Since there was no money fund created this arrangement becomes complex. (See 8, *infra*)

The Court finds that the fee arrangement was so varied that this criterion was not a meaningful factor in the Court's award. The purpose of this question goes to attorney's subjective state of mind as to his fee expectation, and such a state cannot be clearly ascertained from the fee arrangement.

(7) *Time limitations imposed by the client or the circumstances.*

The Court finds that no significant time limitations were imposed by the class clients. Nevertheless, it is this Court's practice to pursue proceedings in all cases vigorously so that the civil calendar may be kept current by trying these cases within four months of issue. This requires timely rulings, filings and responses.

(8) *The amount involved and the results obtained.*

As stated in the Court's April 4, 1976 Order: "In assessing benefit to the class, I am troubled by the effect of a class victory as opposed to settlement. The benefit had this action continued and been concluded in favor of the

class, would have been virtually non-existent. The remedy sought was recission. At the hearing on fairness the Court was forcefully made aware that Premier would most likely have been financially ruined if each class member demanded recision and that there were serious tax consequences to class members if they so elected. It appears now, that a class victory would have been phyrric. There would have been a choice to rescind or not; to do nothing would maintain the status quo and involve no benefit; to rescind would have meant not only substantial repayment of past income tax deductions, but also the possibility that Premier would be unable to fund the payments.

"Of course, the above considerations tend to increase the value of a settlement. However, there is no monetary fund as a result of counsel's efforts. There is a contingent benefit which will materialize *only if and when* class members sell their herds under the extended termination rights provision. In support of their petition for attorney's fees, class counsel strenuously urge that the option to sell at the early termination price exists immediately and continuously for the entire duration of each class member's management contract. It is true that the real benefit conferred is the protection each member receives against the risk of a continued depression in the cattle price market. However, the discounted present value of benefit of settlement presented to the Court assumed that the entire class would participate and there is no way for the Court to determine whether this will occur.

"After careful consideration of the above, I have determined that this is not a case where a percentage of benefits conferred is a proper standard for awarding attorney's fees. *See, Liebman v. J.W. Peterson Coal & Oil Co.*, 63 F.R.D. 684 (N.D. Ill., E.D. 1974) for a case presenting the view of the Seventh Circuit that the services devoted to representing the class, and not the amount recovered, should be the 'lodestar' of fee allowances. Particularly in

light of the contingent nature of the benefit received herein I find that reasoning appropriate."

(9) *The experience, reputation and ability of the attorneys.*

The Court finds that the attorneys Shapo and Freedman had excellent reputations in the community. The pleadings and other filings indicate that these attorneys had an adequate level of competence in the area of securities regulation.

(10) *The undesirability of the case.*

The Court finds that the case was not undesirable as defined under *Johnson*, and thus presented no particular hardship to Class Counsel in the community.

(11) *The nature and length of the professional relationship with the client.*

The Court finds that there was no special relationship between Class Counsel and class members to affect the Court's ultimate award.

(12) *Awards in similar cases.*

No authorities were submitted as to cases dealing with analogous issues of law and fact. The Court takes notice of the fact that class actions of such "tax shelter" securities cases are complex in nature and involve a substanial amount of money.

DONE AND ORDERED at Miami, Florida, this 15th day of February, 1978.

/s/ Clyde Atkins
Chief United States District Judge

cc: Blackwell, Walker, Gray, Powers, Flick & Hoehl

Sinclair, Louis, Siegel & Heath
Shevin, Shapo & Shevin, P.A.

PREMIER CORPORATION,
a Delaware Corporation,
Plaintiff-Appellant Cross Appellee,

v.

Julio R. SERRANO et al., Defendants-
Appellees Cross Appellants.

No. 76-2049.

United States Court of Appeals,
Fifth Circuit.

Aug. 17, 1978.

After remand, 565 F.2d 1353, the United States District Court for the Southern District of Florida, C. Clyde Atkins, Chief Judge, fixed attorney fees awardable to attorneys for class action plaintiffs after approval of settlement. The Court of Appeals held that overall evaluation of record established that award was not an abuse of discretion.

Affirmed.

1. Federal Civil Procedure 1699
Federal Courts 830

Overall evaluation of record established that award of attorney fees to attorneys for class action plaintiffs after approval of settlement was not an abuse of judicial discretion, precluding disturbance of award on appeal.

2. Federal Civil Procedure 1699

Where appeal involved nothing more than a dispute over amount of attorney fees awarded attorneys for class action plaintiffs after approval of settlement, class action attorneys were not entitled to fee in connection with appeal.

Appeals from the United States District Court for the Southern District of Florida.

Before COLEMAN, HILL, and RUBIN, Circuit Judges.

PER CURIAM:

In this case, the District Court fixed the amount of attorneys fees to be awarded the attorneys for class action plaintiffs after a settlement had been approved. As a part of the settlement, the defendant agreed to pay a reasonable fee but it was dissatisfied with the amount assessed. It appealed. After oral argument, we directed a limited remand to the District Court, *Premier Corp. v. Serrano*, 5 Cir. 1977, 565 F.2d 1353. The District Court promptly complied with the remand. After various preliminaries, which need not be detailed here, the Court entered an order, again fixing the attorneys fees at the amount originally specified.

Premier Corporation vigorously claims, not altogether without justification from an argumentative standpoint, that the amount of the award was excessive, a position disputed with equal vigor by the beneficiaries of the award. The dispute has been pursued on both sides with what amounts almost to unprecedented acrimony. Aspersions have been showered upon opposing counsel in a fashion not customarily seen in, or tolerated by, a court of appeals — or, for that matter, by any other court. In the bloated condition of the case load in this Circuit, however, and in view of the fact that we do have a complete record before us, we have decided that the interests of justice would be better served if we ascribe these activities of counsel to excessive zeal, however overdone, and proceed to decide the appeal.

[1] We have carefully weighed the merits of the situation. We find that the District Judge did consider the guidelines prescribed in *Johnson v. Georgia Highway Express, Inc.*, 5 Cir., 1974, 488 F.2d 714. Whatever our individual views might have been had we been sitting on the case in the first instance, from an over-all evaluation of the record we are

persuaded that the award was not an abuse of judicial discretion. Consequently, we cannot disturb it on appeal.

[2] All pending post-appeal motions and countermotions are denied. The appeal involves nothing more than a dispute over the amount of an attorneys' fee award. Before we could confidently dispose of the case, the appellant prevailed to the extent of obtaining a remand. Accordingly, we have further concluded that no attorneys' fees are due the class action attorneys in connection with this appeal and the parties will bear their own costs.

AFFIRMED.

Rule 23. Class Actions

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent

and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dimissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

AGREEMENT

THIS AGREEMENT made this 18th day of July, 1975 by and between JULIO R. SERRANO, an individual ("SERRANO"); ECONOMIC RESEARCH ANALYSTS, INC., a Florida corporation ("ERA"); RICHARD W. McINTYRE, an individual and the President of ERA ("McINTYRE"); and MATTHEW RIGG, an individual and a registered representative of ERA ("RIGG"):

WITNESSETH:

WHEREAS, SERRANO is the Defendant/Counter-Plaintiff and ERA and RIGG are Counter-Defendants in an action styled PREMIER CORPORATION v. JULIO R. SERRANO, Case No. FL 75-90-Civ-CA, United States District Court, Southern District of Florida (the "SERRANO lawsuit");

WHEREAS, the parties wish to keep their litigation expenses to a minimum by simplifying the issues between them in the SERRANO lawsuit;

WHEREAS, without admitting any liability to SERRANO and in the interest of keeping their litigation expenses to a minimum, ERA and RIGG have this day paid to SERRANO the sum of one hundred dollars ($100.00), the receipt of which is hereby acknowledged by SERRANO; and

WHEREAS, the parties wish to expedite certain outstanding discovery pending between them as expeditiously as possible.

NOW, THEREFORE, in consideration of the mutual covenants and promises made by each of the parties to the other and for other good and valuable consideration, the parties agree that:

1. The foregoing representations are true and correct and are made by each in order to induce the other to enter into this Agreement.

2. SERRANO will voluntarily dismiss Count IX of the SERRANO lawsuit as the same pertains to ERA and/or RIGG immediately upon the execution of this Agreement, and SERRANO shall not move to certify the class action against ERA and/or RIGG and/or pursue this claim in any way against ERA and/or RIGG.

3. SERRANO shall not seek a judgment against ERA and/or RIGG in connection with the SERRANO lawsuit.

4. SERRANO shall not, even if a judgment should be entered against ERA and/or RIGG and/or McINTYRE, in favor of SERRANO, execute and/or levy upon said judgment. Moreover, should such a judgment be entered, SERRANO shall immediately file a Satisfaction of said judgment.

5. ERA and RIGG shall forthwith file an Answer (in accordance with the Federal Rules of Civil Procedure) to the Amended Counterclaim, and said Answer shall not raise affirmative defenses.

6. Simultaneously with the execution of this Agreement, the parties will serve responses to Requests for Admissions which they had previously served upon each other.

7. McINTYRE shall, if called to testify at trial, not testify in a manner materially inconsistent with the testimony that he gave at his deposition.

8. ERA and/or RIGG shall not, prior to trial or prior to the time SERRANO rests at trial, move for acquittal. If ERA and RIGG move for a directed verdict at trial, SERRANO will not oppose the same upon the undertaking of ERA and/or RIGG to make themselves available for testimony for the remainder of the trial.

9. It is in no way the intention of the parties hereto to effect in any way, shape or form or to release their respective rights or claims against PREMIER CORPORATION (whether in the SERRANO lawsuit or otherwise), nor may this document be construed or utilized to effect any result which might or would in any way effect or limit any such rights, claims or actions, and this document is hereby declared ineffective to the extent, if any, that it could have or be given such effect. Nevertheless, SERRANO specifically covenants that he will not hereafter sue ERA and/or RIGG and/or McINTYRE on any issues which were or might have been raised by him against them in the SERRANO litigation.

IN WITNESS WHEREOF, the parties have set forth their hands and seals on the day and year first above written.

Witnesses:

JULIO R. SERRANO

/s/ Marha A. Adicideu

By /s/ Julio Serrano (SEAL)
JULIO R. SERRANO

/s/ Vivian M. Hackett

ECONOMIC RESEARCH ANALYSTS, INC.

/s/ Guy Stewart

By /s/ Richard W. McIntyre
RICHARD W. McINTYRE, President

Attest: _____ (CORPORATION SEAL)

RICHARD W. McINTYRE

/s/ Guy Stewart

By /s/ Richard W. McIntyre (SEAL)
RICHARD W. McINTYRE

MATTHEW RIGG

/s/ Genell Cradic

By /s/ Matthew Rigg (SEAL)
MATTHEW RIGG

/s/ Delores Richmond

August 13, 1975

Shevin, Shapo & Shevin, P.A.,
Attention Ronald A. Shapo, Esq.,
Suite 500-A,
2699 South Bayshore Drive,
Miami, Florida 33133.

Re: Premier Corporation v. Serrano,
Case No. FL-75-90-Civ-CA, U.S.
District Court, Southern District
of Florida

Dear Mr. Shapo:

This confirms the agreement made this day by and among plaintiff and counterdefendant, Premier Corporation, counterdefendant, Eldon Roberts, and defendant and counterplaintiff, Julio R. Serrano ("the parties"), to settlement of the captioned cause on the following terms:

1. The parties agree to the execution of mutual releases as to any and all claims arising out of the transactions which are the subject matter of this action in the form attached hereto.

2. Premier Corporation agrees to dismiss the complaint with prejudice and to cancel and void any and all obligations of Serrano and evidence thereof to Premier Corporation, including a return of Serrano's promissory note marked cancelled. In consideration therefor, Serrano agrees to convey all of his right, title and interest in any and all cattle owned by Serrano and presently held in the possession and under the management of Premier Corporation, and to sign such documents necessary to effectuate the same.

3. The parties agree to execute a stipulation for the entry of judgment in favor of Premier Corporation and Eldon Roberts on the counterplaintiff's counterclaim against

Premier and Roberts. Said stipulation and final judgment shall be held by our firm, in escrow, until clearance of the funds referred to in paragraph 5 hereof.

4. Defendant and counterplaintiff, Julio R. Serrano, will dismiss with prejudice the counterclaim as to counterdefendants Matt Rigg and Economic Research Analysts, Inc., so that nothing remains of the currently pending lawsuit.

5. In consideration for Serrano not further prosecuting his counterclaim and thereby permitting entry of final judgment for counterdefendants on same. Premier agrees to pay to Serrano the sum of Thirty-Five Thousand ($35,000.00) Dollars on November 15, 1975, and to execute the attached stipulation for judgment in favor of Serrano in said amount on said counterclaim, which we shall hold in escrow, with the referenced judgment and which shall only be released to Serrano in the event that either a check is not received by you by November 15, 1975, (dated that date) or if that check is not promptly paid within normal bank clearance procedures. Should Premier fail to timely pay the $35,000.00, as aforesaid, then it shall be liable for attorneys' fees, interest and costs incident to its collection.

6. The parties agree that the Pretrial Stipulation filed in this action be withdrawn and expunged, in view of the dismissal of the action.

7. Serrano agrees that the terms of this settlement will be held confidential by him, his attorneys and tax advisors. Notwithstanding the foregoing, the parties may communicate said terms as necessary to such governmental authorities as may require disclosure thereof. To the extent that Serrano may be required to disclose the disposition of this matter to his employers and associates, the fact of dismissal of Premier's claim, conveyance of said cattle, and payment of the $35,000.00 shall constitute the only information to be disclosed.

8. The parties agree that settlement of this action as set forth above is contingent upon determination and order by the court that the orders certifying the alleged class action be vacated entirely.

9. You will disclose to us the full particulars and details of any settlement with E.R.A. or McIntyre and their attorney, Guy K. Stewart.

10. It is agreed that all appropriate documents will be executed among the parties to this agreement by and through their respective counsel. All such documents presently anticipated are referred to herein or are attached hereto and initialled by counsel.

11. You represent that you are not the attorney for any other person known by you to be a Premier herdowner and that you do not contemplate any other litigation against the company, nor do you know of any other contemplated litigation except for disputes between E.R.A. and Premier.

Our respective signatures hereto will bind our clients to the terms of the settlement outlined above.

Agreed to on behalf of Julio R. Serrano	Agreed to on behalf of Premier Corporation and Eldon Roberts
By _____ Ronald A. Shapo Counsel	By /s/ Samuel J. Powers Samuel J. Powers, Jr. Counsel

SHEVIN, SHAPO & SHEVIN, P.A.
Attorneys at Law
Office in the Grove • Suite 500A
2699 South Bayshore Drive
Miami, Florida 33133

August 14, 1975

Robert J. Asti, Esq.,
Blackwell, Walker, Gray, Powers,
Flick and Hoel
Hand Delivered

Re: Premier Corporation v. Serrano

Dear Mr. Asti:

I have executed and delivered to you copies of a settlement letter-agreement dated August 13, 1975; I have initialled the documents required to be initialled thereunder and I have executed each pleading attached thereto, above where my name appears.

In addition, I have received from you a copy of your pleading entitled Plaintiff-Counterdefendant's Motion to Vacate Orders dated July 10, 1975 and August 5, 1975. I have delivered to you the original and two copies of my Memorandum in Reply to that Motion.

It is my understanding that you will be forthwith filing with the Court your Motion to Vacate Orders and that you will be submitting therewith a proposed Order which you will ask the Court to render thereupon.

Further, as a courtesy, you will be delivering my Memorandum in Reply to your Motion.

By your execution of this letter below, you acknowledge that you will hold, in escrow, all of the documents which I have given you, except my Memorandum in Reply to your Motion to Vacate, and that none of these documents will be

submitted to the Court unless and until the Court has entered an Order granting your Motion to Vacate. At that point, you will be at liberty to release any of the other documents I have given you, except as limited or restricted by the terms of our settlement letter-agreement of August 13th.

Sincerely,

/s/ RONALD A. SHAPO
RAS/djw

ACKNOWLEDGED AND AGREED:

_____

Robert J. Asti, Esq.

SHEVIN, SHAPO & SHEVIN, P.A.
Attorneys at Law
Office in the Grove • Suite 500 A
2699 South Bayshore Dirve
Miami, Florida 33133

September 4, 1975

William L. Gray, III, Esq.,
Blackwell, Walker, Gray, Powers,
Flick & Hoehl
2400 First National Bank Bldg.
Miami, Florida

Re: Premier Corporation v. Julio R. Serrano; Modification and Confirmation of Settlement Agreement

Dear Mr. Gray:

This will confirm the fact that the claims in connection with the above cause remain settled in accordance with the provisions of letter-settlement agreement dated August 13, 1975, from Samuel J. Powers, Jr., to myself, except as modified below.

The amount to be paid by Premier Corporation, as established under Paragraph 5 of the referenced letter, shall be $37,500. The provision for confidentiality contained in Paragraph 7 of the letter, I presume, will remain in a general sense, but it is understood that since notice of the action is being necessarily given to all members of the certified Class, together with acknowledgement of the settlement with Dr. Serrano, the limitation and meaning of that provision is necessarily significantly reduced.

Obviously, Paragraph 8 of the letter is now inapplicable, and in its stead, the parties are hereby agreeing that settlement of Serrano's individual claims are conditioned only

upon the Court's approval of a settlement agreement with respect to the Class' claim under Count X of the Counterclaim.

It is understood and agreed that, as partial consideration for the settlement, Dr. Serrano is undertaking the obligation for all of his attorneys fees and costs, insofar as the same relate to his individual claims. However, this fact shall not be construed to in any way modify or limit the obligations of Premier to pay costs and attorneys fees relative to the class action aspect of the litigation, as provided in Paragraph 9 of the Joint Motion for Approval of Settlement as to Count X.

Finally, this will confirm our recognition of the entry of an Order Granting Summary Judgment to Serrano with respect to Count VI of his counterclaim, on August 28, 1975, subsequent to the prior settlement. In view of the confirmation of that settlement, as modified herein, the entry of that Order has become moot, and, accordingly, we agree to join you in a motion seeking to vacate that order, so that all individual claims of Dr. Serrano may be dismissed, with prejudice.

Sincerely,

ACCEPTED AND AGREED

/s/ Ronald A. Shapo
RAS/djw

/s/ William L. Gray
WILLIAM L. GRAY, III,
as attorney for Premier
Corporation and Eldon Roberts

Supreme Court, U. S.
FILED
NOV 13 1978
MICHAEL RODAK, JR., CLERK

in the

Supreme Court

of the

United States

October Term 1978

NO. 78-570

PREMIER CORPORATION,

Petitioner,

vs.

SHEVIN, SHAPO & SHEVIN, P.A.

Respondent.

(Premier Corporation vs. Julio Serrano)

RESPONDENT'S BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI

PAUL A. LOUIS, ESQ.
Sinclair, Louis, Siegel & Heath
Alfred I. duPont Building
Miami, Florida
(305) 374-0544

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
SYMBOLS	2
QUESTION PRESENTED	
Prior Determinations and Modus Operandi	3
Omitted Matters	7
RULES AND STATUTES INVOLVED	10
STATEMENT	
Perspective of the action	11
Chronology	12
ARGUMENT	20
CONCLUSION	30

TABLE OF AUTHORITIES

Cases **Page**

Appalachian Power Co. v. American Institute of Certified Public Accountants,
80 S. Ct. 16 (1959) 25-26

FTC v. Standard Oil Co.,
355 US 396 (1958) 22

Graver Mfg. Co. v. Linde Company,
336 US 271 (1949) 21

Graver Mfg. Co. v. Linde Company,
339 US 605 (1950) 21

Johnson v. Georgia Highway Express, Inc.,
488 F.2d 714 (5th Cir. 1974) 18

Kennedy v. Silas Mason Co.,
334 US 249 (1949) 22

Magnum Import Co., Inc. v. Coty,
262 US 159 (1948) 21

Maule Industries, Inc. v. Roundtree,
264 So.2d 445 (Fla. 4th DCA 1972) 24

NLRB v. Pittsburgh S.S. Company,
340 US 498 (1951) 11, 22

Rice v. Sioux City Memorial Park Cemetery,
349 US 70 (1954) 22, 30

TABLE OF AUTHORITIES (Continued)

Cases **Page**

Sprague v. Ticonic National Bank,
307 US 161 (1939) 28

Stickel v. U.S.,
76 S. Ct. 1067 (1956) 27

Swanson v. State Farm Fire & Casualty Co.,
349 So.2d 202 (Fla. 4th DCA 1977) 25

United States v. Johnston,
268 US 220 (1925) 21

Weinstein v. National Car Rentals,
288 So.2d 509 (Fla. 3d DCA 1973) 8, 24

Statutes and Regulations

Securities Exchange Act of 1934,
15 USC Section 78 ..... 12, 14

Securities Act of 1933,
15 USC Section 77B(1) 12

Regulation T,
12 C.F.G. §220 12

TABLE OF AUTHORITIES (Continued)

Page

Rules

Rule 23 Federal Rules of Civil Procedure ..... passim

Supreme Court Rule 23(4) 6

Supreme Court Rule 19 ..... 22, 30

Other Authorities

Medical Economics Magazine,
"Beware the Bull", May 13, 1974 12

in the

Supreme Court

of the

United States

October Term 1978

NO. 78-570

PREMIER CORPORATION,
Petitioner,

vs.

SHEVIN, SHAPO & SHEVIN, P.A.,
Respondent.

(Premier Corporation vs. Julio Serrano)

RESPONDENT'S BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI

Shevin, Shapo & Shevin, P.A., Respondent, replies to the Petition for Writ of Certiorari filed herein by Premier Corporation.

OPINIONS BELOW

The first order of the District Court, Southern District of Florida is unreported but appears in the Appendix attached to the Petition.

The first order of the United States Court of Appeals for the Fifth Circuit is unreported but was entered 28 August 1975 and appears at Page 270 of the Court of Appeals Appendix. The second order of the United States Court of Appeals for the Fifth Circuit is reported at 565 F.2d 1353 (5th Cir. 1977).

The second order of the District Court is unreported but appears in the Appendix to the instant Petition.

The final order of the Court of Appeals is reported at 578 F.2d 566 (5th Cir. 1978).

JURISDICTION

The final order affirming the award of attorneys' fees to Respondent was entered by the United States Court of Appeals for the Fifth Circuit on August 17th, 1978. Petitioner asserts an attempt to invoke jurisdiction under 28 U.S.C. §1254(1).

SYMBOLS

The following symbols are utilized in this Brief: (APP.) for reference to the Appendix included in the Petition; (A) for the original Appendix prepared for use in the Court of Appeals; (SA) for reference to the Supplemental Appendix prepared in the Circuit Court proceedings; "Class Counsel" refers to the Respondent as named herein; "F.R.C.P." refers to the Federal Rules of Civil Procedure.

QUESTION PRESENTED

Introduction: Prior Determinations and Modus Operandi

Settlement of this class action was achieved four days prior to its scheduled trial on the merits. On 4 September 1975 Premier Corporation, extolling the numerous virtues of the negotiated class settlement, agreed to ". . . pay a reasonable attorneys' fees to Shevin, Shapo & Shevin, as attorneys representing the certified class". (A 285).

The amount of that fee was to be "set by the Court at a subsequent hearing on the evidence presented." (A 285).

Thereafter, the District Court scrupulously received and considered evidence regarding the settlement proposal, as required by Rule 23, F.R.C.P. Included amongst the Court's many findings in approving the settlement was this: "a significant benefit is conferred upon the members of the Class by Premier's agreement to be obligated for the attorneys' fee for the class members' counsel. . . ." (A 294).

On evidence presented thereafter, the District Court awarded an attorneys' fee in the amount of $125,000.00 (A 1-4). Petitioner now seeks to evade its solemn obligation to pay the reasonable fee awarded by the District Court by charging Respondent with abusive tactics such as infidelity to the Class it represented, utilization of the class action as a vehicle to force Premier into a settlement solely with the Class Representative and improper use of a so-called "Mary

Carter" agreement in violation of Rule 23, F.R.C.P., in order to restrict testimony of a witness. These charges are *false*.

Petitioner has urged its claims and arguments in two prior courts, on five separate occasions. When Premier failed to adduce competent substantial evidence to sustain its claims, both courts below refused to dignify the charges, and implicitly rejected them by, respectively, awarding and affirming the award of a substantial attorneys' fee for services rendered to the class. It is apparent that the mere repetition of Petitioner's charges — even in the course of rejecting those charges — could cause unwarranted injured to those charged. It was therefore not unusual that the District Court declined to publish the claims in its several pages of findings. It was similarly appropriate that the Court of Appeals declined to make specific reference to the untoward claims, referring to them only as evidence of "unprecedented acrimony" and "aspersions". Such an appraisal was announced by the Court of Appeals only after it had "carefully weighed . . . the complete record" in its affirmance of the award in question.

The Petition reflects the ultimate manifestation of a briefing technique that has become so virulent over three years that virtually no assertion made by Petitioner may be accepted at face value. The technique first surfaced in a "brief" filed by Premier in the Court of Appeals for the Fifth Circuit in August, 1975, when it sought an unprecedented "emergency appeal on the merits" of the legal issue underlying this class action, even before any ruling had been made thereon by the

District Court. In that brief[2] Premier attacked the District Court personnel with claims of dereliction of duty; cast aspersion by innuendo upon two members of the District Bench; charged a respected professor of national repute (an expert witness in the case) with conspiring to unduly influence District Court personnel; accused the Class Representative (Dr. Julio Serrano, Medical Director of Eastern Airlines) with being a thief; and charged its own prior counsel, a respected Miami law firm, with collusion in a conspiracy against Premier. (See SA 91-2; 102-5).

That "emergency appeal" was rejected by the Court of Appeals (A 270). Thereafter, Premier proposed a class action settlement which was approved by the District Court. Prior to the fee-award hearing, however, Premier re-instituted its unwarranted personalized assaults. The District Judge tried to bring these tactics to a halt by administering a private reprimand to Permier (A 539). Even that measure did not deter the attacks, as Premier continued its distortions in its appeal of the fee awarded.

In the fee award appeal, Petitioner's assault became so relentless and insensitive that Premier even turned upon its own prior local counsel, the respected Samuel Powers,[3] portraying him as having attempted to bribe the Class Representative into dropping the class action for individual gain (See S.A. 105).

---

[2]Circuit Court of Appeals, Fifth Circuit, Case #75-3294.

[3]A lawyer of such national repute that he had been previously retained to represent a former President of the United States.

Premier was given two chances to present proof of its claims, *but on each occasion declined to present any evidence.* Indeed, when the Court of Appeals remanded the case for the District Court to hold hearings or take evidence, Premier flatly responded that — even though it was propounding serious charges — it did "not intend to present any case in chief" upon an evidentiary hearing. (SA -64).

The true misfortune of Petitioner's methodology, therefore, is that it seizes upon events that are as readily attributable to good motive and intent as to bad; infers the worst and insinuates bad motives; piles inference upon inference and, magnified by innuendo, produces a final product bearing no resemblance to reality.

Finally, it should perhaps be noted that the authors of the instant Petition were not the representatives who personally participated in the events in the trial court. Accordingly, they do not write from first-hand experience or knowledge. However, that lack of knowledge is the only possible mitigating factor available in assessing the Petitioner's culpability in filing herein a "Statement" which is a selective presentation of certain facts which are distorted and presented entirely out of context. Further, most significantly, the "Statement" wholly omits to state other crucial facts which serve to expose what is, regardless of intent, the falsity of this Petition and which, as set forth below, virtually mandate denial of the Petition under Supreme Court Rule 23(4).

Omitted Matters:

Before the actual question involved in this Petition can be properly formulated, it is appropriate to consider the factual matters omitted from the Petition:

1. Petitioner charges cross-counsel were unfaithful to the class, suggesting that the action was issued only to give the class representative "leverage" to gain a settlement for himself alone. As "proof", Petitioner asserts that Respondent was not opposing Premier's motion to vacate the class action certification. The crucial *objective* facts, omitted from the Petition, are that during the Friday-Monday weekend that the decertification motion was pending before the District Court — and while class counsel were allegedly just "sitting back" awaiting a decertification order — they prepared and filed fifteen (15) pleadings, motions and memoranda on behalf of the class, investing forty (40) man-hours in this substantial endeavor. (See SA 96-99, A 360-363).

Following the District Court's denial of Petitioner's attempt to "decertify" the class action, Petitioner held an ex-parte conference with the Chief Judge of the Court of Appeals, (A 363-364), seeking the above-noted unprecedented "appeal on the merits". This tactic precipitated an emergency appellate hearing for which class counsel interrupted their vacations to attend on two days telephonic notice and at which Petitioner's attempt to frustrate the class action was soundly defeated (A 365-369; 270).

While Premier charges that class counsel "abandoned" the class, no simpler or more classic opportunity for "abandonment" could have been presented than by

the ex-parte emergency short-notice hearing established while class counsel were on vacation. Not even passing reference to these extraordinary events, which so directly substantiate Respondent's *loyalty* to the class, appears in Petitioner's "Statement".

2. Petitioner portrays the class representative's individual settlement as wrongfully distinguishable from that afforded the class. However, it fails to disclose that when the class representative obtained his settlement rights: (a) he had already been granted *summary judgment* concerning Premier's breaches of warranty (A 267); (b) he released his rights to attorneys' fees and punitive damages in regard to other improprieties committed by Petitioner, while the members of the class retained their individual claims; and (c) he was required to return his herd while the class retained theirs. These factors, not any purported impropriety, were the basis for the monetary settlement received by Dr. Serrano.

3. While Petitioner portrays the class action as being a minor claim of short duration, the class settlement was achieved only after Respondent had expended nearly 1000 hours within a six month pre-trial period of a highly complex suit, with the commencement of trial only four days away. Expert testimony established that the intensity of the litigation produced a file reflective of perhaps four to seven years' work (A 510, 532).

4. Petitioner charges that the "ERA agreement" was an illegal "Mary Carter" settlement reflecting an abuse of Rule 23 F.R.C.P., but omits to state that such agreements are *recognized* in Florida as not being contrary to public policy, *Weinstein v. National Car Rentals*, 288 So.2d 509 (Fla. 3d DCA 1973). It also omits to

state that the agreement did not dismiss a class "action", but simply dropped an alternative sub-class count against an insolvent sub-class defendant after certification of the claim against that defendant had been rendered moot by prior order of the District Court which certified the claim of the entire class against Premier.

5. Petitioner asserts that the so-called ERA agreement reflects a conspiracy to restrict testimony and to obtain "admissions" detrimental to Premier. Petitioner fails to state that the agreement and admissions in question were prompted exclusively by the request of Petitioner's own local counsel, who *consented* to the utilization of request for admissions in lieu of a deposition that had been scheduled. Petitioner further omits to state that the participants in the agreement never intended, in any way, to restrict testimony and that the agreement did not in fact restrict testimony, as the witness in question ultimately testified in direct opposition to the position of the class — thus conclusively destroying the myth of a "conspiracy". See A 543-562.

In light of the circumstances of the case, the nature of the charges, and the material omissions, the actual question presented by the Petition is:

> WHETHER CERTIORARI IS APPROPRIATE TO GRANT PETITIONER A THIRD *DE NOVO* EVALUATION OF CLAIMS THAT PRESENT ONLY ABSTRACT ISSUES PREDICATED UPON FALSE "FACTUAL" PREDICATES WHICH HAVE FAILED TO GAIN APPROVAL TO TWO LOWER TRIBUNALS.

RULES AND STATUTES INVOLVED

Respondent believes that there are no federal rules or statutes that have a bearing upon the disposition of this Petition, since it is solely concerned with a factual dispute.

In light of the "facts" as asserted by Petitioner, however, it is acknowledged that Rule 23 F.R.C.P. may be tangentially involved.

Supreme Court Rule 23(4) of the Rules, is, however, clearly applicable. That Rule provides, in pertinent part, that "failure of a petitioner to present with accuracy . . . whatever is essential to a ready and adequate understanding of the points requiring consideration will be sufficient reason for denying his petition."

STATEMENT

Petitioners' stated reasons for seeking the Writ are purportedly that the Court of Appeals' *failure to mention* alleged "tactics" will cause: (1) proliferation; and (2) repetition thereof.

Even apart from the fact that the "tactics" were non-existent, it seems self-evident that other class counsel can hardly proliferate or repeat tactics that the reported decisions do not even mention. Further reasons why certiorari is inappropriate herein will become apparent when the case is placed in its proper perspective and the actual chronology is reviewed.

Perspective of the action:

The Court of Appeals for the Fifth Circuit placed this case in its proper present context when it stated "the appeal involves nothing more than a dispute over the amount of an attorneys' fee award". The case, therefore, presents issues of importance only to the parties, and not to the public, and certiorari is not appropriate. *NLRB v. Pittsburgh S.S. Company,* 340 US 498 (1951).

While the current perspective of the case is as a private dispute over an attorneys' fee award, the original proceedings were of far greater importance and complexity. Petitioner purports to be the nation's largest integrated beef producer. (A 318). It displayed substantial fiscal growth over the past decade in large part due to methods of capital solicitation asserted to be illegal under the federal securities laws. The peculiar business operations of Petitioner involved demonstrable common

law violations such as, e.g., deceptive trade practices and breach of warranty.[3]

The last of Premier's public offerings brought significant financial misfortune to members of the public who agreed to invest in excess of $24 million in Premier's Corporation's "investment contracts", upon the inducement of credit extended in violation of the margin requirements of Regulation T, 12 C.F.R. §220. (A 115). The class action was filed and prosecuted to obtain relief for those investors and succeeded in obtaining that relief through the substantial settlement rights achieved.

Chronology:

In early 1974, due to the availability of 90% financing, Dr. Julio Serrano accepted Premier's offer to invest large sums of money into a cattle herd "investment contract".[4] Thereafter, disillusioned with Premier following a series of questionable occurrences in the investment program, Serrano consulted Respondent. (A 339). Respondent's initial review indicated that serious violations of law had occurred.

[3]Summary judgment based on breach of warranty was entered in favor of the class representative on an individual claim on August, 1976, see *supra*. These deceptive practices received nationwide attention: e.g., "Beware the Bull", an article published in *Medical Economics Magazine*, May 13, 1974 (A 566-570).

[4]The "investment contract" was of the type specified in 15 USC §77B(1) and 15 USC §78C(a)(10).

In early 1975, Premier sued Serrano. (A 339-40) Litigation proceeded at a whirlwind pace.[5] Class counsel believed that the illegality in the sale to Dr. Serrano tainted the sale to every investor. After substantial discovery, which factually confirmed the soundness of a claim for class relief, amended pleadings were filed which formally instituted the class action.[6] (A 38).

Discovery information substantiated that the Petitioner had offered and sold the subject investment contracts in contravention and evasion of instructions from the Federal Reserve Board and the Securities and Exchange Commission. (See, e.g., 162-189). In some of the sales Premier acted through Economic Research Analysts, Inc., ("ERA"), a securities broker. (A 99-100). Although an alternative sub-class claim was raised against ERA on behalf of those who had dealt with Premier through ERA, relief was sought on behalf of *all*

[5]The claim required almost unprecedented amounts of discovery within a greatly expedited pre-trial schedule. Discovery provisions of the Federal Rules were utilized in virtuoso fashion, including submission of over 150 relevant technical Interrogatories; 75 detailed Requests for Admissions; and numerous and extensive Requests for Production. Discovery necessitated analysis of technical documents comprising over 2,000 estimated pages. In total, Class counsel filed in excess of 200 separate pleadings and memoranda and raised or dealt with 17 issues which were major or of novel occurrence, or of first impression (See A 335-337).

[6]The class-action pleadings were hand-delivered to Premier on Saturday, 30 May, 1975, at Respondent's offices at the close of certain dispositions. The pleadings were then mailed (the next business day) to the Clerk of the District Court, who docketed same on 3 June, 1975. This hand-delivery was a mere courtesy to Petitioner, not part of a plan to "extract an individual settlement" for the class representative, as Premier asserts on Page 5 of the Petition.

the class against Premier as an active and *primary* violator of the Exchange Act, 15 USC Section 78, *et seq*, not on a mere "derivative basis", as is blithely asserted in the Petition.

On 10 July, 1975, the District Court granted Respondent's Motion to Certify the claim against Premier as a class action which, particularly in light of the facts then discovered, rendered certification of the ERA sub-class moot. (A 144). Premier, on that same day, suggested a settlement of Dr. Serrano's individual claims. Respondent immediately and totally *rejected* such a course of action because the class representative could not settle individual claims while a class action was pending. (SA 115).

As indicated, the request and *consent* of Premier's counsel, coupled with pre-trial deadlines, resulted in an agreement for expedited written discovery between Serrano and ERA. That agreement, dated 19 July 1975, was additionally mandated by other factual considerations. ERA was a small operation in precarious financial straits. (SA 119). Further, ERA's counsel envisioned certain defenses that might be detrimental to the class, but which had not been pled by Premier. The so-called "Mary Carter" agreement did confirm that the prior testimony of ERA's President had been accurate, but, as noted, there was never the slightest inference or discussion that future testimony was to be restricted. (SA 118-119; 407-411).

On 12 August 1975, Premier's representatives contacted Respondent in a *wholly-unsolicited* fashion and again suggested a settlement of Dr. Serrano's individual claims. (SA 115). Respondent again advised that no individual settlement could be possible, but Premier

stated it intended to move to set aside class action certification and that it was confident that it could convince the District Court to do so. Respondent reaffirmed its belief in the merit of the class action, both substantively and procedurally, but agreed to a CONDITIONAL settlement of Dr. Serrano's claims if and only if Premier finally prevailed on the issue of class-action status, so that no class would then exist. (SA 115-116).

If the letter agreement of 13 August 1975, (App 21a), was, as Petitioner now contends, Premier's attempt to unduly influence the class counsel and representative to deviate from their obligations to the class, the attempt failed: when Premier filed its Motion seeking to vacate the class certification, Respondent continued to forcefully represent the interests of the investors. The record reflects that Respondent did not "roll over and play dead" but rather continued to expend intensive efforts on behalf of the class while Petitioner's motion was pending. Nevertheless, Petitioner overlooks the *fact* of active opposition to decertification efforts and disingenuously advises this Court that it was "anticipated" that the District Court would vacate the class action certification (Petition, Pgs. 7 & 14). That "anticipation", if any there was, existed solely in Premier's mind.

After the emergency appeal was dismissed on 28 August 1975, (A 270), and with trial imminent, Premier made a further settlement proposal — this time for the benefit of the entire class. A further conditional settlement was also proposed as to those of Serrano's individual claims for which Summary Judgment had not yet been granted, notably those for fraud and punitive

damages. The settlement negotiated for the class was reasonable and included a grant to each investor of an option to either retain his herd or to require Premier to repurchase his herd over an extended five year period at prices *double* the then-current market value. Supporting documentation verified the soundness of the settlement proposal and a Joint Motion for Settlement Approval was filed. (A 281). Following a hearing the District Court indicated preliminary approval, set an evidentiary hearing, and directed that notice be sent to all class members. That notice — sent by the Court — included express references to the facts that:

1. Serrano would receive a separate individual settlement, (the true bases for which are described *supra*, p. 8), and

2. Petitioner had agreed to pay reasonable attorneys' fees to class counsel in an amount to be set by the District Court.

Following the evidentiary hearing, the Court approved the settlement. No objection was made as to the aspects of the settlement relative to Serrano's individual settlement or to the attorneys' fee provision. Ironically, strenuous objection to the class' position was made at the settlement hearing by its alleged "conspirator", ERA. (A 543-562).

Subsequently, but still prior to the fee establishment hearing, Premier attempted to *intimidate* class counsel into accepting a small fee by suggesting that it (Premier) would charge class counsel with wrongdoing or impropriety. Respondent refused to be coerced by a threat having no basis in fact. Premier then commenced

its planned "charges", while declining to present any evidence regarding its claims at the fee hearing.

A formidable cast of experts was presented by both sides at the fee hearing of 23 December 1975. All were esteemed professionals of the highest rank. The expert testifying for Premier utilized a somewhat short-sighted approach, basing his opinion essentially upon "hours" and found that the services of the class counsel warranted a fee of up to $75,000.00, (A 538) assuming that only half the time expended by Respondent had actually been necessary to prosecute the claim. The other experts focused primarily on the value established for the settlement rights obtained[7] and evaluated Respondent's services as deserving a fee ranging from $400,000.00 to $600,000.00 (A 507, 511, 516). There was one point of unanimity: no expert was of the opinion that the documents now relied upon by Premier (the ERA agreement and the so-called "individual settlement" letter) reflected conduct which should have had a bearing on the fee entitlement. See, e.g., A 512, 519, 523.

Immediately following the fee hearing, the District Court directly confronted Premier regarding its charges

[7]Estimates of value ranged from $3,000,000.00 according to Premier's own expert, (A 537) to in excess of $6,000,000.00 according to an independent certified accountant. (A 334) (Premier, characteristically, also cast vicious aspersions on the accountant's independence — charges it was forced to publicly retract when the accountant learned what had been filed by Petitioner. See A 382-383).

(A 539).[8] Premier retreated. Thereafter, in the fee award Order, the District Court found the "benefits conferred" factor inapplicable and bottomed its award on the factor of "services devoted to representing the class." (APP 3a). The award of $125,000.00 spoke for itself in regard to Premier's charges.

Premier appealed the fee Order, reasserted its charges and also contended that the Order was defective in form, since it did not expressly treat each of the twelve fee-determinant factors announced in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). On 29 December 1977, the Circuit Court ordered a limited remand so that the District Court could entertain any further proceedings it deemed appropriate and thereafter enter an Order expressly treating each *Johnson* factor. (APP 5a).

On limited remand, the District Court instructed the parties to submit proposed findings of fact and conclusions of law (SA 6). Both sides complied. Premier's proposed findings increased in intensity the acrimonious "misconduct" claims. It advised the District Court that because Premier had not "fully preceived" the entirety of the circumstances until its appeal of the fee award, it would "now" present them "more squarely" (SA 10); yet Petitioner rejected still another opportunity to present any evidence in support of its "charges." (SA 64).

[8]Premier's lawyers abjectly apologized to the District Court for Premier's accusations against the Court and its personnel in its 1975 brief to the Court of Appeals (Case #75-3254). (A 539). The Michigan counsel acknowledged that the "charges" were based upon speculation and assumption — not on evidence. Premier's Florida counsel explained that they had not read that brief before they lent their name to it, and profusely apologized (See SA 92). Significantly, Premier's Florida counsel never appeared on any subsequent brief in this cause.

The District Court then complied with the mandate of the limited remand, finding, *inter alia*, that:

a. Respondent had expended between 900 and 1000 hours in the subject cause;

b. The matter was complex, requiring a high degree of skill;

c. Much of the work was performed on an emergency basis, precluding other employment;

d. The case involved novel legal issues;

e. Respondent enjoys an excellent reputation in the community;

f. That such cases involve substantial amounts of money (AP 6a-11a).

Again implicity refuting the charges with an award of $125,000.00, the Court declined to dignify Premier's claims with any further comment.

Supplemental briefs were thereafter filed in the Circuit Court. Petitioner's baseless assault continued, and appellate litigation was thus reduced to the "unprecedented acrimony" which the Court of Appeals ascribed to "excessive zeal of counsel". The Court of Appeals affirmed the award, since the record supported the District Court's exercise of discretion. (App 12a-14a).

The instant Petition was then filed.

ARGUMENT

CERTIORARI IS NOT AVAILABLE TO GRANT PETITIONER YET ANOTHER HEARING SEEKING A *DE NOVO* EVALUATION OF ITS CLAIMS. THE PETITION PRESENTS ABSTRACT ISSUES NOT GROUNDED IN FACT, AND ESSENTIALLY PRESENTS FACTUAL ISSUES RATHER THAN ISSUES OF LAW.

Petitioner ostensibly seeks review of the propriety of certain purported class action tactics (Petition, Pg. 10). It proclaims a fear that the tactics allegedly employed may ultimately destroy litigation under Rule 23 (Petition, Pg. 11). To the contrary, Respondent has deep concern that Petitioner's "tactics" will prove injurious to class litigation; for its tactic is the technique of strenuous intimidation.[9] It is respectfully submitted that practice under Rule 23 would rapidly come to a halt if each prospective class counsel were to be forewarned that the successful prosecution of a class action and subsequent request for an attorneys' fee would expose him to the class defendant's unrelenting attack in the public records, based on unfounded inferences of impropriety, disloyalty and procedural abuses.

Petitioner asserts that there are only four possible responses to the subject matter of the Petition (Petition,

[9]We note the change in the style of this action to directly name Class Counsel as Respondent. While the change is intended to intimidate Respondent and to downplay the importance of the underlying class action, it rather serves to highlight the fact that these proceedings concern only a private dispute between two law firms.

Pgs. 12-13), but ignores the obvious fifth alternative: that the crucial "facts" presented were untrue and had been soundly rebutted by Respondent in the lower courts; that the intent and effect of the allegedly improper documents were sorely distorted by Petitioner; that the charges of "leverage", "abuse" and "disloyalty" are patently false; and that *therefore* neither court below deigned to dignify Petitioner's repeated defamations with specific comment.

Petitioner recognizes (Petition, Pg. 12) that no court over the past three years has been inclined to agree with its assessment of the record. Thus, in essentially seeking a trial *de novo* in this Court, Petitioner disregards the fact that certiorari is not available to obtain a re-evaluation of the evidence. Evidentiary evaluations fall within the functions of the District Court. *Graver Mfg. Co. v. Linde Company*, 339 US 605 (1950). This Court is a court of law, not a court sitting to correct purported errors in factual determinations. *Graver Mfg. Co. v. Linde Company*, 336 US 271 (1949). The Court does not "grant a certiorari to review evidence and discuss specific facts". *United States v. Johnston*, 268 US 220, 227 (1925).

The jurisdiction of the Court to consider cases by certiorari was established to secure uniformity of decisions between the Circuit Courts and to consider cases involving questions of importance which are required, by public interest, to be decided the Court of last resort. The certiorari jurisdiction "was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing", *Magnum Import Co., Inc., v. Coty*, 262 US 159, 163 (1923), nor to resolve matters of importance only to the parties, such as in

regard to an attorneys' fee award. This Court is not the forum in which to review conflicting evidence, *NLRB v. Pittsburgh S.S. Co., supra;* nor is it appropriate to deposit voluminous documents herein and request this Court to reduce to "fact" a mass of conflicting contentions and inferences; that task is for the District Court. *Kennedy v. Silas Mason Co.,* 334 US 249 (1949). Where the proper decision of a controversy depends on questions of fact and where different interpretations may be drawn, this Court has declined to interfere even though the Petitioner contends that denial of the Writ would seriously hinder future administration of the law. *FTC v. Standard Oil Co.,* 355 US 296 (1958).

Rule 19 makes it clear that a Petition for Writ of Certiorari is addressed to the Court's sound judicial discretion, to be granted only where "special and important reasons" appear. The requirement for "special and important reasons" indicates that the problem to be resolved must be "beyond the academic or episodic". Abstract questions may present intellectually interesting problems "but this Court does not sit to satisfy a scholarly interest in such issues." *Rice v. Sioux City Memorial Park Cemetery,* 349 US 70, 74 (1954).

Insofar as the factual basis of Petitioner's claims is non-existent, the questions raised are merely academic; insofar as the questions raised are peculiar to the unique circumstances of the case, they are merely episodic. Neither instance warrants the extraordinary Writ of Certiorari.

Re: Alleged extraction of individual settlement through abuse of Rule 23.

Obviously, it is true that Rule 23 may be abused to extract settlements from class defendants. However, the District Court, the Circuit Court, and the Respondent all have rejected — and the Record refutes — Petitioner's assertion that such an abuse occurred herein. Petitioner cannot fairly explain[10] how it was that, at the very point in time where the allegedly-desired "individual settlement" was proffered, the Respondent strenuously resisted Premier's efforts by researching, preparing and serving fifteen motions and pleadings over the weekend following Premier's motion to vacate class action certification.

Even more dramatically, Premier is at a loss to advise why — given the classic factual context in which to "abdicate" its responsibility to the class without appearing to do so — class counsel went to such extraordinary lengths to successfully defend the class before the Fifth Circuit on the "emergency appeal".[11]

[10]In earlier briefs, (Premier's reply brief, Case No. 76-2049; SA 35) Premier suggested that the work product was produced only *after* the motion to vacate was already denied. It supported this fact-twisting with an argument that the "docketing dates" indicated that these pleadings were "docketed" after the Court's ruling denying decertification. It omitted to advise the Circuit Court that the actual date of service *preceded* Respondent's receipt of the District Court's Order on the Motion and that the docketing date often ran many days behind, as the District Court was sitting in one County while pleadings were being transmitted by mail to the branch of the District Court located in another County. (See SA 96 through 99). Once Respondent disclosed this distortion, Premier grew silent on the issue and wisely declined to advance that argument herein.

[11]*See p. 7 supra.*

Re: The "MARY CARTER" Settlement

Petitioner's assertion that "Mary Carter" agreements are against public policy is directly contrary to established decisional law in Florida. *Weinstein v. National Car Rentals, supra; Maule Industries, Inc. v. Roundtree,* 264 So.2d 445 (Fla. 4th DCA 1972). Indeed, it has been held that reference to such agreements as "secret" is improper and prejudicial. *Swanson v. State Farm Fire & Casualty Co.*, 349 So.2d 202 (Fla. 4th DCA 1977). Similarly inaccurate is Premier's assertion that the existence of the ERA Agreement was "secret." Premier had made charges of "conspiracy" concerning the Agreement as early as July, 1975, in the District Court, and August, 1975, in the Circuit Court. In Florida, disclosure of such agreements is required upon Motion prior to trial, but Petitioner failed to file such a Motion. The case was never tried; had it been tried the agreement would have been disclosed. Indeed, Respondent did disclose the particulars of the Agreement (A 395-399) and acknowledged its willingness to produce the document itself, requesting only that Premier file a former Motion to obtain same (A 394-396). The document was then freely produced.[12]

[12]Petitioner's asserted distaste for "secrecy" must be contrasted with: a) Premier tried to require that the extensive Pre-Trial Stipulation (which fully documented its business practices) (A 87-141) be "expunged" from the public record — physically removed from the Court file — ostensibly based upon a claim that its own highly reputed Miami attorneys had evidently conspired therein to "admit facts that were as plainly false as black is white" — but the desire to expunge the Pre-Trial Stipulation reflected an obvious attempt to preclude access by other investors who might be pursuing their individual claims. The District Court denied Premier's Motion to Expunge, but *did* order the Stipulation to be sealed (A 86); b) The ERA "secrecy provision" is the same one that Petitioner insisted upon inserting in its own settlement agreement with Dr. Serrano.

No case cited by Petitioner is applicable to the unique circumstances concerning resolution of the alternative sub-class claim raised, but not certified, against ERA. It is submitted that the procedure followed did not violate the spirit or intendement of Rule 23. The sub-class certification was moot and the settlement was not of a class "action" (Rule 23e) since the action remained pending with the full rights of the class preserved to be prosecuted against the solvent and primary class Defendant, Premier Corporation.

While Petitioner now asks this Court to issue pronouncements on the use of "Mary Carter Agreements" in class actions, the case at this point concerns only an attorneys' fee award, not rulings that the District Court *might* have made on the class action itself, *if* it had not been settled. Respondent does not comprehend how a 1978 ruling of this Court as to the use of such agreement could have any legitimate effect on the entitlement to attorneys' fees for services rendered in 1975, in a State where such agreements were then and are now permissible. At most, Petitioner's "Mary Carter" argument presents only an academic debate over an unsettled issue of extremely limited application under Rule 23 — hardly an issue which either concerns an "abusive tactic" or which creates a "special and important" basis for granting certiorari. Even if the District Court's attorney fee award could, tangentially, reflect some implicit approval of the use of the agreement in question, ". . . ordinarily an application by a District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this Court. This is particularly true where, as here, the question is one that concerns the judgment of the District Judge in relation to a particular set of facts." *Appalachian Power*

Co. v. American Institute of Certified Public Accountants, 80 S. Ct. 16 at 17 (1959).

Petitioner's assertion that the Agreement required ERA to admit materials so that same could be used to support the class's Motion for Summary Judgment against Premier is also incorrect. Nothing in the document required that any matters by "admitted"; all that was required was that the responses be expedited and, in fact, the admissions merely synthesized a variety of information previously learned through discovery. The admitted facts were all true (A 407-416; SA 118, 119) and the procedure was utilized only after Premier's counsel consented (A 415, 416).

Premier's current position is that it "was constrained to settle" because of the pending Motion for Summary Judgment on the class claim, which purportedly was enhanced by the ERA admissions; that position is contrary to its assertions in the Courts below, where it claimed that it was "forced" to settle because the District Court refused to grant a trial continuance. (A 379).

Re: Tactics "Condoned" by the Court of Appeals

Petitioner asserts that the Court of Appeals' decision "necessarily conveys the message to class litigants" that the use of the purported "tactics" will not be rebuffed and that the tactics will become "increasingly common . . . in federal litigation." (Petition Page 18). The "charges", however, have never been mentioned in a single court decision. Respondent is thus at a loss to understand how a decision which does not mention an

aspect of the case could possibly convey such a message to those who know nothing about this case.

Respondent suggests that there are two real "messages" transmitted by this case:

a. Award of attorneys' fees and factual determinations are governed by the standard of the exercise of the trial court's judicial discretion. This was the rule announced by the Circuit Court herein and is the standard applied in all Circuits. The standard is of such universal application and recognition that it could not possibly warrant the issuance of the Writ of Certiorari; and

b. Federal courts will not dignify charges lacking factual basis with further publication in their opinions, because the mere mention of the charges — even while rejecting them — would tend to cause injury to innocent parties.

Re: Estoppel

It is clear that mere dictum from the Court of Appeals is not reviewable, *Stickel v. US*, 76 S. Ct. 1067 (1956), yet Premier asks this Court to "review" matters that do not even rise to the level of mere "dictum": it requests pronouncement on legal theories that are not even mentioned in any decision below. Rather, speculating between the lines of the Circuit Court's opinion, Premier fathoms that the Court "apparently determined" that Premier's agreement to pay a fee "estopped" it from raising claims of misconduct. This argument is the quintessential strawman — created by the Petitioner solely so that Petitioner might knock it down.

Neither the questions at oral argument nor the opinion of the Circuit Court, nor any other objective criterion even faintly suggests that the Circuit Court "determined" that Premier was estopped. What is apparent is that the Circuit Court "carefully weighed the merits of the situation" based upon the "complete record" that was before it, and acted within its permitted discretionary powers to affirm the award.

Surprisingly, Premier evinces in its "estoppel" argument a purported concern over the "potential effect of disenfranchising the class". (Petition, Pg. 19). Such an announced concern must be somewhat suspect in light of Premier's continuous efforts to thwart the Classes' rights throughout the litigation, even to the extent of its ex parte emergency appeal and its self-asserted attempts to induce disloyalty by the class representative. Under the circumstances of this case, Premier's belated "concern" for the Class is more than sanctimonious; it is galling.

Petitioner recognizes that "equitable principles" should pertain to the fee award. It is submitted that Premier's self-proclaimed but futile attempt to "pay off" the class representative is reflective of a technique inimical to the healthy funtioning of the federal judicial process. Petitioner surely should not benefit from such actions.

Petitioner cites *Sprague v. Ticonic National Bank*, 307 US 161 (1939), concerning the application of equitable principles to attorneys' fee awards, but fails to acknowledge the most fundamental of all equity maxims: he who seeks equity must do so with clean hands.

In closing, Respondent notes that Rule 24 affords Petitioner the opportunity of filing a reply brief, but no similar provision is made for Respondent. While Respondent cannot predict whether any additional "charges" will be asserted in Premier's reply brief, it is respectfully submitted that all of the various claims presented in prior stages of this litigation are treated in the various filings of Respondent below, and in the voluminous record, and in the briefs and materials set forth in the supplemental appendix. Respondent invites the Court's attention to those filings should other claims be advanced hereinafter by Premier Corporation.

CONCLUSION

No conflict has been claimed in regard to the decision of the Circuit Court herein, nor does any conflict exist. The Circuit Court has not decided an important question of federal law which should be settled by this Court; it has simply decided a private issue — a dispute over attorneys' fees. None of the Rule 19 considerations exist because there is no factual basis for the claims. Accordingly, while the Petition may present academic questions of interest, without factual basis, ". . . this Court does not sit to satisfy a scholarly interest in such issues." *Rice v. Sioux City Memorial Park Cemetery, supra.*

The instant Petition seeks a trial *de novo* of factual propositions implicitly rejected below. No issue "beyond the academic or episodic" *Rice, supra,* has been advanced. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

Paul A. Louis
Sinclair, Louis, Siegel & Heath
Alfred I. duPont Building
Miami, Florida
(305) 374-0544

Supreme Court, U. S.
FILED
NOV 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1978

No. 78-570

PREMIER CORPORATION,

Petitioner,

v.

SHEVIN, SHAPO & SHEVIN, P.A.,

Respondent.

PETITIONER'S REPLY MEMORANDUM

James R. Beuche
Bruce T. Wallace
HOOPER, HATHAWAY,
FICHERA & PRICE
Tenth Floor, First National
Building
Ann Arbor, Michigan 48104

Attorneys for Petitioner
Premier Corporation

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

IN THE

Supreme Court of the United States

October Term 1978

No. 78-570

PREMIER CORPORATION,

Petitioner,

v.

SHEVIN, SHAPO & SHEVIN, P.A.,

Respondent.

PETITIONER'S REPLY MEMORANDUM

Respondent seeks to defeat this Petition by creating, in its opposing brief, the appearance of a factual dispute which can be resolved only by *de novo* review of the Court. In addition, Respondent characterizes the issues raised in the Petition as being of academic interest only and as not constituting important questions of federal law.

Reply to the assertion of a factual dispute poses a dilemma for Petitioner. Unless Respondent's brief is refuted

point-by-point, it might be suggested that those points cannot be refuted. At the same time, any detailed refutation would, in effect, appear to confirm the existence of a relevant factual dispute. That dilemma, however, is more apparent than real, as the essential facts upon which this Petition is based have not, and cannot, be disputed. Those facts are:

(a) The secret settlement agreement with one of the class codefendants, including all of the elements of that settlement, which has been submitted to this Court in the Appendix to the Petition;

(b) The unsuccessful settlement agreement with Petitioner, the effect of which would have been to entirely dispossess the class, which is as well a part of the Appendix; and

(c) The final settlement agreement with the class and with the class representative, and the contrasting terms of those agreements, which likewise have been submitted to this Court.

Those documents, on their face, provide ample basis for decision by this Court upon the issue raised in the Petition. Accordingly, though the temptation is great to refute in detail Respondent's factual contentions, the only necessary reply is again to refer this Court to those documents, as to which no dispute is possible.

Reply to the assertion that the issue in this Petition is "academic" may be similarly brief. The effect of the class litigation in this case was, and is, starkly non-academic and tangible to Petitioner, as a result of the settlements with the class and the class representative and as a result of Respondent's claims in this proceeding. Similarly tangible and non-academic is the documentary evidence referenced above, upon which the issues in this Petition are based. Petitioner's interests are real, and its contentions are hardly

As to the importance of the issues raised in this Petition, the question presented is the appropriate use of class litigation in the federal judicial process, and the required role of counsel in that ligitation. The failure of the lower courts in this case, to address the documentary facts bearing upon that question, rather than detracting from its importance as urged by the Respondent, highlights the need for the direction of this Court in that regard.

Therefore, Petitioner requests that the Petition be granted.

James R. Beuche
Bruce T. Wallace
HOOPER, HATHAWAY,
FICHERS & PRICE
Tenth Floor, First
National Building
Ann Arbor, Michigan
48104

Attorneys for Petitioner
Premier Corporation